The International Criminal Court and the Treatment of Defence Rights: A Mirror of the European Court of Human Rights’ Jurisprudence?

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Abstract

The International Criminal Court (ICC) has been a mirror of the European Court of Human Rights when defining the scope of defence rights and limiting their exercise on public interest grounds. The ICC has been consistently deferential to the Strasbourg Court in the interpretation of the accused’s rights to disclosure of evidence and to cross-examine prosecution witnesses, leaving the door open for a virtual theory of implied external limitations upon defence rights. The ICC has nevertheless failed to provide a rationale, besides its non-systematic reference to the ICC Statute’s human rights enabling clause, when cross-fertilising with the Strasbourg Court. The latter has not only exerted influence over other international human rights monitoring bodies but also accounted for judicial developments within domestic and international fora when tailoring its own human rights standards. The ICC has overall proven to be a promising platform for extrapolating regional interpretations of fair trial rights to the international legal order.

Keywords: right to a fair trial – defence rights – limitations on rights – cross-fertilisation between courts – International Criminal Court – European Court of Human Rights

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1. Introduction

The aim of this article is to demonstrate that the International Criminal Court (ICC) has significantly deferred to the European Court of Human Rights (ECtHR) when determining the scope of and shaping implied external limitations upon the minimum guarantees of the accused (‘defence rights’). The latter represent a subcategory of fair trial rights, which also include institutional guarantees such as the publicity and the expeditiousness of the trial proceedings, as well as the impartiality and independence of the court. The ECtHR has been so far oblivious to the ICC’s procedural case law when interpreting Article 6 of the European Convention on Human Rights (ECHR or ‘the Convention’), or when admitting implied external limitations upon defence rights based on public interest grounds or the protection of competing rights. Nevertheless, the ECtHR has incrementally cross-referred to the Rome Statute of the International Court 1998 (‘ICC Statute’) when determining the scope of the States’ positive obligations stemming from certain substantive human rights.

Procedural fairness requires a coherent and predictable framework in order to provide legal certainty to the interfering authority and to the individual affected by the public interest interference. For the ICC, guidance in developing this framework may be derived from the practice of international human rights bodies. It is the theme of this article that the ICC has been the most consistent and systematic amongst other international criminal courts in its references to and review of the ECHR case law, often refraining from reviewing case law developments in other international human rights systems.

It may be questioned how useful it is to compare the case law of the ECtHR with that of a permanent international criminal court given their distinct purpose, structure, jurisdiction and composition. After all, the ECHR was not conceived of as a pan-European code of criminal procedure, or as the comprehensive ‘basic law’ of Europe. Instead, the ECHR represents a regional treaty setting forth ‘minimum standards of human rights’ protection. It is an

4 Lawson and Schermers, Leading Cases of the European Court of Human Rights (Leiden: Ars Acqui Libri, 1997) at xxvii.
5 Jacobs, ‘To What Extent Have Restrictions on the Enjoyment of Freedoms Evolved?’, in Council of Europe, Proceedings of the Fourth International Colloquy About the European Convention on
incomplete human rights treaty in relation to defence rights in that the ECHR drafters overlooked the pre-trial phase, and omitted from its subject-matter essential defence rights such as the rights of the accused not to self-incriminate and to be present at his hearing, although these deficiencies have to some extent been made good by interpretation. Furthermore, the ECtHR, whether at its inception or after Protocols 11 and 14 to the ECHR successively entered into force, was not established as a supreme court of Europe with the power to annul or invalidate domestic penal judgments. Conversely, the ICC Statute and the Rules of Procedure and Evidence of the ICC contribute to the formation of a complex body of international criminal procedural law governing the proceedings before the permanent court, and are not meant to form an international bill of human rights governing the functioning of domestic courts.

Nevertheless, the ECtHR and the ICC share certain institutional and value-based features, which make the comparison worthwhile. As put by Stephanos Stavros, ‘[a]lthough harmonization of the criminal procedure systems is not aimed at, some degree of uniformity in the protection for the accused is the stated goal of European cooperation in the field of human rights law’. Although positing that the ECHR does not fully describe European criminal procedure, which is mainly shaped by European States’ domestic criminal laws, Roger Kirst nevertheless suggested that the ECHR defines some aspects thereof. Although in the form of a human rights treaty, the ECHR has certainly impinged upon the criminal procedure of several Contracting Parties to the ECHR, which in some cases have had to amend long-standing legal institutions so as to comply with the ‘results’ prescribed by the ECHR in the field of procedural fairness. Moreover, the ICC applies procedural

7 Protocol No 11 to the ECHR 1998, ETS 5, entered into force on 1 November 1998, which restructured the control machinery established.
8 Protocol No 14 to the ECHR 2004, ETS 194, entered into force 1 June 2010, which amended the control system of the Convention.
rights enshrined in its Statute as supplemented by its Rules. International criminal procedural law is to this extent underpinned by the guarantees of fairness and expeditiousness, the latter representing principal objectives of international criminal trials. Some of the ICC’s human rights rulings are sufficiently abstract and detached from the very wording of the procedural rules they are meant to interpret as to be comparable, albeit in an imperfect way, with constitutional or quasi-constitutional interpretations of defence rights made by the ECtHR.

Section 2 of this article will outline the difference between internal and external limitations upon human rights. Section 3 will describe the legal basis for human rights enforcement within the ICC system. Section 4 will elaborate upon the two supranational courts’ interpretation of procedural fairness. Section 5 is dedicated to the limitation framework within the ICC system in comparison with that prevailing in the ECHR. Section 6 will analyse the normative treatment of the ECHR case law by the ICC. Section 7 will analyse the normative treatment of the ICC’s internal legal framework by the ECHR. Section 8 will describe how the ECtHR has admitted or may admit in the future implied external limitations upon defence rights, including through the admission of absolute anonymity. Section 9 will describe how the ICC has admitted or may admit in the future implied external limitations upon defence rights in light of the ECtHR’s judicial practice, including absolute anonymity. Section 10 will put forward tentative explanations for the ICC’s deferential attitude towards the ECtHR. Section 11 will summarise the various developments as regards the judicial interaction between the ECtHR and the ICC in the treatment of fair trial standards.

2. Distinction between Internal and External Limitations

The present article is premised on the conceptual difference between internal and external limitations upon human rights. ‘‘Internal limitations’ ask the
question whether the exercise of a human right is triggered in the first place.\textsuperscript{16} These limits are either express or implied.\textsuperscript{17} They encompass three subsets: (i) ‘definitional restrictions’; (ii) exceptions or ‘interpretative clauses’; (iii) definitions by \textit{renvoi}. ‘Definitional restrictions’ represent the inherent conditions (in terms of the persons, circumstances, time and subject-matter) for the applicability or concretisation of a right.\textsuperscript{18} For instance, the procedural guarantees expressed in paragraphs 2 and 3 of Article 6 of the ECHR are only open to an individual facing criminal charges. Exceptions or ‘interpretative clauses’ are provisions which, by their very formulation, permanently exclude from the scope of the right certain persons, ‘areas’, ‘hypotheses’ or situations.\textsuperscript{19} The death penalty is a typical exception to the right to life pursuant to Article 2(1) of the ECHR. A definition by \textit{renvoi} leaves it up to the State to define the content of a particular right.\textsuperscript{20} This is the case of the right to marry whose modalities of exercise are left up to the State to regulate under Article 12 of the ECHR.

‘External limitations’,\textsuperscript{21} whether express or implied, refer to the power of political institutions to act inconsistently with the right as defined.\textsuperscript{22} These limits are both ‘contingent’ and ‘conditional’.\textsuperscript{23} In order for such a limit to be relevant to a specific case, a State has to invoke a conflicting public interest susceptible of overriding the right.\textsuperscript{24} Such limitations are express when they

\textsuperscript{16} Gardbaum, ‘Limiting Constitutional Rights’ (2007) 54 University of California Los Angeles Law Review 789 at 801. François Venter refers to the expression ‘internal modifiers’ in order to describe ‘a word or phrase that forms an integral part of the definition of a particular right.’ See Venter, Constitutional Comparison: Japan, Germany, Canada and South Africa as Constitutional States (Cape Town: Kluwer Law International, 2000) at 189. They have also been referred to as ‘intrinsic limitations’: see Aubert, ‘Limitation des droits de l’homme: le rôle respectif du législateur et des tribunaux’, in de Mestral et al. (eds), The Limitation of Human Rights in Comparative Constitutional Law (Covansville: Yvon Blais Inc. 1986) 185 at 189.

\textsuperscript{17} See Gardbaum, supra n 16 at 805. Arai-Takahashi, on the contrary, posits that these internal limits can only be express: see Arai-Takahashi, ‘The System of Restrictions’, in van Dijk et al. (eds), Theory and Practice of the European Convention on Human Rights, 4th edn (Antwerp: Intersentia, 2006) 333 at 343.

\textsuperscript{18} McHarg, ‘Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights’ (1999) 62 Modern Law Review 671. See also Gardbaum, supra n 16; and Oruçu, ‘The Core of Rights and Freedoms: the Limits of Limits’, in Campbell et al. (eds), Human Rights (Oxford: Basil Blackwell, 1986) 37 at 40. They have also been referred to as ‘internal modifiers’: see Venter, supra n 16 at 189.


\textsuperscript{20} See Arai-Takahashi, supra n 18 at 342 and 343; and Hovius, supra n 19.

\textsuperscript{21} See Gardbaum, supra n 16 at 789 and 795.

\textsuperscript{22} Unofficial translation. See Van Droogenbroeck, supra n 19 at 89–90. They have also been referred to as extrinsic limitations: see Aubert, supra n 16 at 190.

\textsuperscript{23} See Gardbaum, supra n 16 at 803–4.

\textsuperscript{24} Ibid.
find their legal basis in a constitutional, quasi-constitutional or treaty-based clause. They are implied when they are set by the judiciary in the absence of an express limitation or qualification clause restricting the human right in question, or beyond the ordinary terms of such a clause.

Contrary to what Svensson-McCarthy and Vegleris suggest, this distinction between external and internal limitations is not purely doctrinal. The legal techniques which the judge may adopt to solve a question of human rights limitation may vary depending on this characterisation. Questions of definition of a right typically entail an interpretative exercise whilst assessments of external limitations upon human rights predominantly involve some proportionality exercise under comparative constitutional law. While the internal limit is integral to the right and thus is part of the first step in the legal reasoning, the external limit is separate from it, and is the object of a second analytical stage.

The line between internal limits and external limits to a human right can be very thin in light of the following three observations. First, an internal limit may expressly allude to a public interest ground in the form of an exception or of an inherent condition of applicability. Article 6(3)(c) of the ECHR, for instance, refers to the ‘interests of justice’ as a trigger for the awarding of legal aid. This is a matter of pure interpretation and does not, on the face of it, require balancing. Second, an internal limit may expressly call for a weighing of values mirroring the proportionality exercise. A typical example is the requirement for the absolute necessity of the use of force in order to fall within the scope of an exception to the right to life under Article 2(2) of the ECHR. Third, although there may be no express allusion to a proportionality requirement or to a public interest ground, a court of law may balance conflicting interests when ascertaining whether the scope of a right has been triggered. This is sometimes referred to as ‘proportionality-interpretation’. Here, the definition of the very scope of a human right may only embrace the assessment of those public interests that are inherent in the raison d’être of a right.

26 See Gardbaum, supra n 16 at 801–2, 809–11.
27 Jacobs conceded the absence of a ‘rigid distinction’ between the two types of limits: see Jacobs, supra n 5 at 190.
29 Van Droogenbroeck, supra n 19 at 118.
30 Baker, ‘Limitations on Basic Human Rights – A View From the United States’, in de Mestral et al., supra n 16 at 77.
differs from the justifiability of external limitations, which integrates the appraisal of ‘other societal interests unrelated to the rationale of the right’.  

3. Legal Basis for Human Rights Enforcement within the ICC System

The ICC Statute lays down the sources of law that are to be applied by the ICC and establishes a hierarchy of sources tailored to the Court’s needs. The permanent international criminal court is bound to apply: (i) the Rules (so long as they are consistent with the Statute); (ii) the Statute; (iii) ‘where appropriate’, international treaties and general rules of international humanitarian law; and (iv) general principles of law as derived from the national legal systems, so long as they are in accordance with the Statute and with public international law. The ICC Statute also provides that the Court can follow ‘principles and rules of law as interpreted in its previous decisions’. Finally, Article 21(3) of the ICC Statute emphasises that the Court has to interpret its internal legal framework in such a way as to abide by ‘internationally recognized human rights’ law. This provision thus embodies a ‘human rights law enabling clause’. This is in stark contrast to the Ad Hoc Tribunals’ respective Statutes and Rules, which fail to specify the sources of international law applicable to them, let alone their hierarchical relation.

Even absent Article 21(3) from the ICC Statute, the ICC would still be bound by internationally recognised human rights law. As a subject of international law, the ICC is not immune from Article 38 of the Statute of the International Court of Justice (‘ICJ Statute’), which enumerates in a non-exhaustive way the sources of public international law. The direct sources of international law are: (i) treaty law; (ii) customary law; and (iii) general principles of law. The indirect or interpretative sources of international law are: (i) doctrine and (ii) case law. As the International Court of Justice has made it clear in its

31 Ibid. at 75 and 77.
33 Article 21(2), ICC Statute.
34 Article 21(3), ICC Statute.
In the international criminal procedural context, human rights would ordinarily be applicable to the ICC to the extent that they belong to customary international law or consist in general principles of law. The ICC cannot be bound by international human rights treaties to which it is not a party except indirectly through a renvoi expressly or implicitly contained in its Statute.

Some authors have even argued that all or at least some fair trial standards can be considered norms of jus cogens; therefore, even more compelling upon the ICC. The latter association is problematic for two main reasons. The right to a fair trial and the minimum guarantees of the accused are subject to a derogation clause under the ECHR, the International Covenant on Civil and Political Rights (ICCPR), and the American Convention on Human Rights (ACHR), albeit to various degrees depending on the nature of the human rights instrument. Furthermore, the right to a public hearing is qualified by an express limitation clause under the above mentioned three human rights instruments. The counter-argument to these two caveats is that limitation and derogation clauses are tailored to the inherent characteristics of States and thus cannot be automatically imported into the arena of international criminal proceedings.

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36 Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt Advisory Opinion, ICJ Reports 1980 73 at 89–90.
37 Sluiter, supra n 35 at 937. In the Aleksovski Appeals Judgment IT 95-14/1-A (2000) at para 104, for instance, the ICTY Appeals Chamber already held that the accused’s right to a fair trial was reflective of international customary law.
40 Articles 6 and 15, ECHR.
41 Articles 4 and 14, ICCPR.
42 Articles 8 and 27, American Convention on Human Rights 1969, 1144 UNTS 123.
43 See Article 6(1), ECHR; Article 14(1), ICCPR; and Article 8(5), ACHR.
44 See Sluiter, supra n 35 at 938 and 940.
4. Notion of Procedural Fairness under the ECHR and ICC Systems

Both the ECtHR and the ICC have had difficulties in putting forward a precise definition of procedural fairness, instead contenting themselves with a reference to a broad standard, and incrementally deriving new procedural guarantees from the abstract notion of 'fairness'. The ICC has, for instance, defined the right to a fair trial as 'the ability of a party to a proceeding to adequately make its case, with a view to influencing the outcome of the proceedings in its favour'.45

The ICC has reasserted that the right to a fair trial should be considered a 'fundamental right'.46 This mirrors the ECtHR's understanding of the right to a fair trial as holding 'a prominent place... in a democratic society'.47 The ICC has also identified the existence of implied fair trial rights by either inferring a right from an extensive interpretation of the right to a fair trial (ie the right to equality of arms),48 or by elevating a regulatory obligation placed upon the Court as an individual right (ie the right to disclosure of evidence).49 Recourse to this process of inference has been less prevalent under the ICC system than under the ECHR, as the express statutory provisions guaranteeing defence rights within the ICC system have been more comprehensive in their scope than under the ECHR.50 Many implied defence rights under the ECHR

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45 Situation in Uganda in the case of the Prosecutor v Joseph Kony and others, Decision on Prosecutor's application for leave to appeal in part Pre-Trial Chamber II's Decision on the Prosecutor's applications for warrants of arrest under Article 58, ICC-02/04-01/05-20 (2005) at para 30.

46 Situation in the Democratic Republic of Congo in the case of the Prosecutor v Thomas Lubanga Dyilo, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, ICC-01/04-01/06-1401 (2008) at para 77.

47 Ünsal v Turkey Application No 24632/02, Merits, 20 February 2007, at para 31; Kemal Kahraman and Others v Turkey Application No 42104/02, Merits, 26 April 2007, at para 32; Shabelnik v Ukraine Application No 16404/03, Merits, 19 February 2009, at para 52; Hanzeyevski v Croatia Application No 17182/07, Merits, 16 April 2009, at para 28; and Samokhvalov v Russia Application No 3891/03, Merits, 12 February 2009, at para 57.

48 Ibid. at para 77. In this case though, the ICC also derived the right to disclosure of evidence from the right to a fair trial and, by so doing, it ended up turning a regulatory entitlement, part of 'objective law', into a 'subjective right'. For a distinction between 'objective' and 'subjective right', see Maxeiner, 'Legal Certainty: A European Alternative to American Legal Indeterminacy?' (2006–2007) 15 Tulane Journal of International and Comparative Law 541 at 557.

49 This makes once more the ICC's internal legal framework more precise than the Ad Hoc Tribunals' Statutes and Rules, which failed to incorporate the right of silence at the trial stage.
system have been made explicit under the ICC Statute: the right to be present at one's hearing, the rights of silence and not to self-incriminate, and the rights to legal assistance and to legal aid at the pre-trial stage.

By reference to the ECtHR's case law, the ICC has also recognised that the right to a fair trial benefits not only the accused but 'all participants in the proceedings', thereby encompassing the prosecutor and the victims. This human right therefore has the particularity of not just being a 'variable standard' but also of representing a general public interest.

The ICC Appeals Chamber has propounded a broad approach to the concept of fairness, underscoring the fact that it is aimed at 'the judicial process in its entirety'. By reference to the ECtHR's case-law, the ICC has assigned an open-ended scope to the right to a fair trial, which encompasses the minimum guarantees of the accused whilst not being limited thereto. The right to a fair hearing is thus a framework right 'by which all other principles of fair trial are covered'. The right to fairness is thus what ties all the procedural guarantees together and allows the list of minimum guarantees to be illustrative rather than exhaustive. Indeed, if no minimum guarantee of the accused has been breached, the trial could still be found to be unfair due to the evolving and autonomous meaning of 'fairness'.

51 Articles 63(1) and 67(1)(d), ICC Statute.
52 Article 67(1)(g), ICC Statute.
53 Article 55(2)(c), ICC Statute.
55 Situation in the Democratic Republic of Congo in the case of the Prosecutor v Thomas Lubanga Dyilo, Judgment on the Appeal of Thomas Lubanga Dyilo against the Decision on the defence challenge to the jurisdiction of the Court ICC-01/04-01/06-772 (OA4) (2006) at para 37.
58 Ashworth, 'Victims' Rights, Defendants' Rights and Criminal Procedure', in Crawford and Goodey (eds), Integrating a Victim Perspective within Criminal Justice (Dartmouth: Ashgate, 2000) at 188.
will continue to be uncertainty as to the way in which it relates to defence
rights.61 Unlike the ICTY, which has implicitly alluded to the *jus cogens*
nature of defence rights in general,62 both the ECtHR and the ICC have refrained
from assigning such a status to fair trial rights.

5. Limitation Regime with the ECHR and the ICC System

In this section a comparison will be undertaken between the ECHR regime of
human rights limitations and that prevailing within the ICC system. This step
is indispensable in order to understand the extent of any theory of implied
external limitation upon defence rights, and to underscore the *sui generis*
status characterising fair trial rights.

A. ECHR—Presence of specific limitation clauses and of a general
derogation clause

During the discussions at the Parliamentary Assembly, and at the Experts
Committee and Conference of Senior Officials convened by the Committee of
Ministers of the Council of Europe in the context of the elaboration of the
ECHR, there were two main approaches to the drafting of the rights to be
enshrined in the Convention: the ‘definitional approach’ and the ‘enumerative
approach.’63

The definitional approach, propounded by the UK, the Netherlands, Greece,
Norway and Denmark consisted in laying down a detailed list of rights and of
corresponding limitations defined with great precision in a legally binding

61 Findlay, 'Synthesis in Trial Procedures: The Experience of International Criminal Tribunals’
(2001) 50 International & Comparative Law Quarterly 26 at 48. Beck even argues that, al-
though the right to a fair trial is presented by the ECHR as absolute given the absence of 'ex-
pressed qualifications', it nonetheless is de facto qualified by the inherent vagueness of the
concept of fairness which has allowed the Court to avoid politically contentious decisions
and show deference to national legal traditions.’ See Beck, 'Human Rights Adjudication
under the ECHR between Value Pluralism and Essential Contestability' (2008) 2 European
62 Prosecutor v Tadić, Appeal Judgment on Allegations of Contempt against Prior Counsel, Milan
63 Council of Europe, *Collected edition of the ‘travaux préparatoires’ of the European Convention on
Council of Europe, *Collected edition of the ‘travaux préparatoires’ of the European Convention on
Rights: Volume IV* (The Hague: Martinus Nijhoff, 1985) at 106, 178, 246, 248, 254 and 258; and
Schabas, 'Ireland, the European Convention on Human Rights, and the Personal
Contribution of Sean MacBride’, in Morison, McEvoy and Anthony (eds), *Judges, Transition
document so as to enable States to know with sufficient precision which type of commitments they are bound by.\textsuperscript{64} A corollary of this approach was the inclusion of a derogation clause.\textsuperscript{65}

The enumerative approach, adhered to by France, Italy, Ireland, Turkey, Belgium and Luxembourg (with the latter two States subscribing to this approach on the condition that a ECtHR be established) consisted in writing down a concise list of rights in the form of ‘abstract maxims’ that could be given concrete meaning in the enforcement phase and whose limitations, ‘methods and conditions of exercise’ the Contracting Parties to the ECHR would define themselves.\textsuperscript{66} Under this approach, no derogation clause would be required given the presence of a general limitation clause.\textsuperscript{67}

Eventually, the draft proposed by the Conference of Senior Officials to the Committee of Ministers was premised on a compromise solution with nevertheless a stronger emphasis placed on the definitional approach. Rights were, as result, considerably detailed whilst general principles (eg the concept of ‘necessity in a democratic society’) were incorporated, which confer leeway upon the ECtHR in its interpretative activity.\textsuperscript{68}

No one normative model perfectly captures the complexity of the limitation regime with the ECHR system.

\begin{itemize}
\item \textsuperscript{66} See Council of Europe (Volume I), supra n 63 at 70–2; Council of Europe (Volume III), supra n 63 at 170 and 254; and Council of Europe (Volume IV), supra n 63 at 178 and 248.
\item \textsuperscript{67} The first draft of the ECHR contained a general limitation clause (Article 6) similar to Article 29(2) of the Universal Declaration of Human Rights 1948, GA Res 217 A, A/810 at 71. This text provided that: ‘In the exercise of these rights, and in the enjoyment of the freedoms guaranteed by the Convention, no limitation shall be imposed except those established by law, with the sole object of ensuring the recognition and respect for the rights and freedoms of others, or with the purpose of satisfying the just requirements of public morality, order and security in a democratic society.’ This clause, adopted by the Consultative Assembly of the Council of Europe, was subsequently rejected by the Committee of Ministers in favour of specific limitation clauses: see Consultative Assembly of the Council of Europe, First Ordinary Session, 8 September 1949, AS (1) 108 262.
\end{itemize}
Based on their analysis of the text and structure of the ECHR, Ashworth and Redmayne identify three types of rights that are part of an overall hierarchy of rights: ‘non-derogable rights’, ‘strong rights’ and ‘qualified rights’.\(^6^9\) The first category consists of rights that are subject to no express limitation clause and that cannot be suspended under the general ‘derogation clause’ in Article 15 of the ECHR. These rights enjoy the highest degree of protection under the Convention: the right to life;\(^7^0\) the prohibition against torture, inhuman or degrading treatment or punishment;\(^7^1\) the prohibition against slavery or servitude;\(^7^2\) the principle of non-retroactivity of criminal offences and penalties;\(^7^3\) the abolition of the death penalty;\(^7^4\) and the right not to be tried or punished twice.\(^7^5\) The second category consists of rights that, although open to suspension under the derogation clause, are not subject to any express limitation clause: the freedom from forced or compulsory labour;\(^7^6\) the right to a fair trial, including the minimum guarantees of the accused, the right of appeal in criminal matters and the right to compensation for wrongful conviction;\(^7^7\) the right to liberty;\(^7^8\) the right to freedom of thought, conscience and religion;\(^7^9\) the right to an effective remedy;\(^8^0\) the right to education;\(^8^1\) the right to free elections;\(^8^2\) the prohibition on imprisonment for debt;\(^8^3\) the prohibition on the expulsion of nationals;\(^8^4\) the prohibition

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70 Article 2, ECHR.

71 Article 3, ECHR.

72 Article 4(1), ECHR.

73 Article 7, ECHR.

74 Article 1 of Protocol No 6 to the ECHR 1983 ETS 114 (Protocol No 6), concerning the abolition of the death penalty; Article 1 of Protocol No 13 to the ECHR 2002, ETS 187 (Protocol No 13), concerning the abolition of the death penalty in all circumstances.

75 Article 4(3) of Protocol No 7 to the ECHR, 1984 ETS 117 (Protocol No 7), excludes from the scope of the derogation clause the right not to be tried or punished twice, which is a minimum guarantee of the accused and therefore a corollary of the right to a fair trial.

76 Article 4(2), ECHR.

77 Article 6, ECHR; and Articles 2 and 3 of Protocol No 7.


79 Article 9(1), ECHR. Although in theory subject to the derogation clause, this right has been treated by some human rights scholars as a non-derogable or absolute. It would be inconceivable for a State Party to the ECHR to suspend this fundamental human right by reference to the existence of a public emergency, as it goes to the heart of a person’s ‘forum internum’ or ‘individual conscience’. See Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the European Convention on Human Rights* (Antwerp: Intersentia, 2002) at 93–4.

80 Article 13, ECHR.

81 Article 2 of Protocol No 1 to the ECHR 1952, ETS 9 (Protocol No 1).

82 Article 3 of Protocol No 1.

83 Article 1 of Protocol No 4 to the ECHR 1963, ETS 46 (Protocol No 4), securing certain rights and freedoms other than those already included in the Convention and in Protocol No 1.

84 Article 3 of Protocol No 4.
on collective expulsion of aliens; the general prohibition against discrimination; and the more specific prohibition against discrimination on enumerated grounds in the exercise of one of the rights or freedoms enshrined in the ECHR. Hence, they constitute an intermediary category of human rights.

The third category encompasses those rights that are subject to both the derogation clause and an express limitation clause based on the protection of other individual rights or of public interest considerations such as morals, public policy, crime prevention or national security. These rights are the most exposed to a proportionality analysis and include the rights to privacy and to a family life; the right to manifest one’s religion or beliefs; the right to freedom of expression; the right to freedom of assembly and association; the right to freedom of movement; the right to equality between spouses; and the right to peaceful enjoyment of property.

The classification of Article 6 of the ECHR as a strong right has to be nuanced. First, the text of Article 6 admits of an express limitation upon one of its procedural guarantees: the public character of the hearings. Second, as acknowledged by the authors of this classification themselves, internal limitations in the form of exceptions or definitional restrictions can qualify rights that are traditionally perceived as absolute. Therefore, the right to a fair trial, broadly understood, borrows characteristics from both the first and the third category, depending on the procedural guarantee at stake. More generally, this overall classification does not capture the traits of the right to appeal

85 Article 4 of Protocol No 4.
86 Protocol No 12 to the ECHR 2000, ETS 177 (Protocol No 12).
87 Article 14, ECHR.
88 Article 8(2), ECHR.
89 Article 9(2), ECHR.
90 Article 10(2), ECHR.
91 Article 11(2), ECHR.
92 Article 2(3)–(4) of Protocol No 4.
93 Article 5 of Protocol No 7.
94 Article 1 of Protocol No 1.
96 This is supported by Ashworth and Redmayne’s assertion that ‘... their meaning and reach are subject to interpretation, and in that sense they are not absolute rights – or, at least, not until the scope of their application has been finally determined.’ See Ashworth and Redmayne, supra n 69 at 36. A typical example of an absolute right subject to exceptions is the right to life. The prohibition against torture, inhuman or degrading treatment or punishment requires that a certain threshold be reached before it can be triggered, which supposes a weighing of all the circumstances of the case. In that sense, Article 3 ECHR suffers from definitional restrictions: see Soering v United Kingdom A 161 (1989); 11 EHRR 439 at para 100; and Tyrer v United Kingdom A 26 (1978); 2 EHRR 1 at para 30. Rivers even argues that Article 3 ECHR has been the object of a proportionality review by the ECtHR: see Rivers, supra n 28 at 182–3.
in criminal matters, and the *non bis in idem* principle and the right to compensation in case of wrongful conviction, which are not subject to a limitation clause but whose scope is defined by reference to national law.97 They are characterised by what Arai-Takahashi and Shelton respectively named ‘limitation by delimitation’ and ‘clawback clauses’ based on the *renvoi* technique.98

Sudre distinguishes between ‘conditional rights’ and ‘intangible rights’. While the former would be affected by an express limitation clause and/or a derogation clause, the latter would be subject to no accommodation clause whatsoever.99 This distinction suffers from its lack of precision: it does not account for the fact that some absolute rights may comprise essential elements that are relative in essence and entail inner definitional limits. Furthermore, it puts on an equal footing those derogable rights that are subject to an express limitation clause and those that are not.

Another model proposed by White and Ovey distinguishes between qualified rights (e.g. the rights protected under Articles 8 to 11 of the ECHR and Article 1 of Protocol No 1 to the ECHR) and unqualified rights (e.g. procedural rights and the non-derogable rights).100 This model, although appealingly simple, suffers from the following structural flaws: (i) it fails to single out the right to a fair trial as a less well protected right than non-derogable rights; (ii) it does not account for the existence of one express limitation clause associated with the right to a public hearing; (iii) it does not convey the way in which the unqualified character of a right can be reconciled with the existence of formal exceptions to its content (e.g. the right to life); and (iv) it does not explain how the non-derogable nature of one express fair trial right (i.e. the right not to be tried/punished twice) makes it distinct from those other fair trial rights that are subject to the Article 15 derogation procedure.101

**B. The ICC – Absence of derogation clause, presence of a limitation clause and of qualification clauses**

Article 64(2) of the ICC Statute stipulates that ‘[t]he Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect
for the rights of the accused and due regard for the protection of victims and witnesses. Although the ICC Statute does not contain any derogation clause comparable to that enshrined in Article 15 of the ECHR, the ICC's internal legal framework does contain a limitation clause affecting the right to a public hearing, and several 'qualification clauses', as this term is understood in the following paragraphs.

Besides the 'public hearing' statutory limitation clause that is implemented through the ICC Rules, regulatory provisions found in the ICC's Statute, Rules or Regulations have the potential, although not automatically and depending on the Court's interpretative discretion in this respect, of interfering with the exercise of defence rights. They will be grouped under the expression 'qualification clauses'. Not all regulatory provisions are qualification clauses. Regulatory provisions in general are those provisions designed to control the exercise or the 'mode of utilization' of a particular right without necessarily resulting in a restriction of its exercise.102

There are structural differences between the ECHR and the ICC respective regimes of human rights limitations. First, at the ICC level, the interfering authority is the ICC itself or one of its organs, and not a State or its national authority. Second, some public interest limitation grounds enshrined in the core provisions of the ECHR are just ill-adapted to the inherent characteristics of international criminal courts.103 Third, when such a qualification clause is laid down in the Regulations, the latter being drafted by the ICC itself, as opposed to ICC Statute or its Rules,104 it may be said that the qualification clause stems from the interfering authority itself (i.e. the international judiciary). This is in contrast to the ECHR system where specific limitations clauses were inserted into the text of the Convention by the drafting bodies of the Council of Europe and in light of proposals put forward by the drafting States. Additionally, unlike the ECHR limitation clauses which accompany the respective provisions enshrining the scope of the human right and which are rather abstract, the qualification clauses found in the ICC Statute and Rules are drafted in a fair amount of detail, are not easily detachable from the substance of the procedure and are thus not neutral as to the content of the ultimate judicial interference. Qualification clauses therefore lose their status as quasi-constitutional constraints over the interfering authority, especially when the latter is also the authority drafting them (i.e. Regulation 76(1) of the ICC Regulations in relation to the right to self-representation).

These structural differences notwithstanding, the ECtHR's and the ICC's admissions of implied external limitations upon some of their human rights provisions suggest that the international judiciary arrogates itself the power

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102 See Oruçü, supra n 18 at 37, 40.
103 See Sluiter, supra n 35 at 938.
104 The ICC Statute and its Rules by contrast may only be drafted and amended by the Assembly of States Parties to the ICC Statute: see Article 51, ICC Statute.
either to read its internal legal instruments beyond the ordinary terms of their limitation or qualification clauses, or to read new limitation or qualification clauses into those internal human rights stipulations that are on their face unqualified.

Article 68(1) of the ICC Statute does empower the ICC to adopt various protective measures aimed at ‘the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.’ The formulation of this introductory provision may make it appear as a general limitation clause qualifying all fair trial rights. When considering such measures, the Court has to account for ‘all relevant factors’, which include the nature of the international crime, the age, gender and health of the victim or witness. Particular consideration will be given to the fact that the crime was sexual, based on gender violence or that the victim was a child. This judicial discretion is nevertheless tempered by the caveat that those measures may not be ‘prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.’

The ICC Statute nevertheless contains a limitation clause affecting the right to a public hearing under Article 68(2). The latter can be limited in order to protect the following legitimate interests: (i) the protection of a victim and especially a victim of a sexual crime or a child; (ii) the protection of a witness and especially a child; and (iii) the protection of an accused. The Article suggests that this judicial interference will be quasi-automatic in the case of victims of sexual crimes or of victims and/or witnesses who are children unless the overall context of the case justifies otherwise. This clause does not give any indication of the way in which the proportionality tool is to be used, if at all.

Article 68(5) of the ICC Statute, as implemented in Rule 81(4), forms a qualification clause, which may result in the judicial imposition of intermediary interferences with the right to cross-examine prosecution witnesses through partial anonymity. The Trial Chamber may thereby allow the Prosecutor not to disclose a witness’ identity to the accused for the duration of the pre-trial proceedings, as a form of protective measure.

The ICC Statute contains a specific qualification clause relating to the right of the accused to be present in court. Article 63(2) alludes to three specific justificatory criteria conditioning the validity of such a judicial interference: (i) the measure has to be connected to the accused’s disruptive behaviour; (ii) it has to be justified by the ‘exceptional’ nature of the context; (iii) there has to be consideration of ‘reasonable alternatives’; and (iv) the duration of the judicial interference has to be ‘strictly required’ by the circumstances. This

106 Article 63(2), ICC Statute.
qualification clause thus strongly emphasises the suitability and the less restrictive means tests as guiding the proportionality analysis of interferences with the accused's right to be present.

Article 72 of the ICC Statute provides for a specific qualification clause affecting the accused's right to disclosure of evidence in the name of a State's national security.

Regulation 76(1) of the ICC Regulations stipulates that ‘[a] Chamber, following consultation with the Registrar, may appoint counsel in the circumstances specified in the Statute and the Rules or where the interests of justice so require’.\(^\text{107}\) This qualification clause is rather imperfect, as it only refers to a test regarding the end to be achieved (i.e. the ‘interests of justice’ presented as a legitimate objective) without including other justificatory criteria that would help relate the judicial interference to the concept of ‘interests of justice’. This qualification clause is also peculiar in that it is enshrined in a legal instrument that the Court has drafted itself as a ‘procedural legislator’.\(^\text{108}\)

6. ICC’s Judicial Practice Regarding the Legal Status Attached to the ECtHR’s Case Law

It is well established under public international law that there is no hierarchical relationship between international courts unless their respective constitutive instruments provide otherwise.\(^\text{109}\) The ICC has been more consistent and systematic than the ad hoc tribunals in its references to and analyses of the ECHR system, often refraining from reviewing case law developments of other international human rights monitoring bodies. It has on a few occasions assigned only limited effect to the judgments of the ECtHR, but has mostly regarded them as having ‘persuasive authority’. The expression ‘persuasive authority’ has been defined in comparative legal scholarship as the ‘authority which attracts adherence as opposed to obliging it’.\(^\text{110}\)

The ICC has often relied upon Article 21(3) of its Statute to invoke the ECHR and its corresponding case law.\(^\text{111}\) The ICC Appeals Chamber has furthermore


\(^{108}\) Articles 52, ICC Statute.


\(^{111}\) Situation in the Democratic Republic of Congo, supra n 46 at para 57; Situation in the Democratic Republic of Congo in the case of the Prosecutor v Thomas Lubanga Dyilo, Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I, ICC-01/04-01/06 (OA 13) (2008) at para 46; Situation in the Democratic Republic of Congo in the case of the Prosecutor v Thomas Lubanga Dyilo, Decision on the application for the interim release of Thomas Lubanga Dyilo, ICC-01/04-01/06 (2006) at 5; Situation in the Democratic Republic of Congo in
held that the ICC Statute in its entirety was founded on a concern for human rights. In several instances though, the ICC has simply applied the ECtHR’s case law without theorising as to the legal basis for its incorporation into its reasoning. The ICC in its case law typically describes or quotes ECHR judgments to support its shaping of fair trial guarantees without clarifying how the Strasbourg precedents relate to other external sources of human rights law, such as the jurisprudence of the Ad Hoc Tribunals or of international human rights monitoring bodies.

The Court has referred to the ECtHR’s case law in relation to the following matters: (i) provisional release requests; (ii) partial anonymity requests; (iii) the abuse of process doctrine; (iv) the determination of scope of the right to disclosure of evidence; (v) the interpretation of the right to free assistance of an interpreter; (vi) the interpretation of the right to be tried

the case of the Prosecutor v Thomas Lubanga Dyilo, Decision on the defence challenge to the jurisdiction of the Court, ICC-01/04-01/06 (2006) at para 9; Situation in the Democratic Republic of Congo, Judgment on the Prosecutor’s application for extraordinary review of Pre-Trial Chamber I’s 31 March 2006 Decision denying leave to appeal, ICC-01/04 (2006) at para 38; Situation in the Democratic Republic of Congo, supra n 56 at para 37; and Situation in Uganda in the case of the Prosecutor v Joseph Kony and others, Decision on the Prosecutor’s position on the Decision of Pre-Trial Chamber II to redact factual descriptions of crimes from the Warrants of Arrest, motion for reconsideration, and motion for clarification, ICC-02/04-01/05 (2005) at para 19.

Situation in the Democratic Republic of Congo, supra n 56 at para 37. This ruling mirrors the Tadić Appeals Jurisdiction Case, supra n 109 at para 45, in which the ICTY Appeals Chamber held that the Tribunal was premised on the need to guarantee ‘all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments’.

Situation in the Democratic Republic of Congo in the case of the Prosecutor v Thomas Lubanga Dyilo, Judgment on the appeal of Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I, ICC-01/04-01/06 (OA 7) (2007) at para 124; Situation in the Democratic Republic of Congo in the case of the Prosecutor v Thomas Lubanga Dyilo Decision on the requests of the Defence of 3 and 4 July 2006, ICC-01/04-01/06 (2006) at 5–6; Situation in Uganda, Decision on Prosecutor’s applications for leave to appeal dated 15 March 2006 and to suspend or stay consideration of leave to appeal dated 11 May 2006, ICC-02/04-01/05 (2006) at para 24; Situation in Uganda, supra n 45 at para 30; Situation in the Democratic Republic of Congo in the case of the Prosecutor v Thomas Lubanga Dyilo, Judgment on the appeal of Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81, ICC-01/04-01/06 (2006) at paras 50–1; Decision establishing general principles governing applications to restrict disclosure pursuant to Rule 81(2) and (4) of the Statute, supra n 57 at paras 31–2.

Situation in the Democratic Republic of Congo in the case of the Prosecutor v Thomas Lubanga Dyilo, Judgment on the appeal of Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I, ibid.

Situation in the Democratic Republic of Congo, Decision establishing general principles governing applications to restrict disclosure, supra n 57 at para 32.

Situation in the Democratic Republic of Congo, Decision on the Defence challenge to the jurisdiction of the Court, supra n 111 at 9.

Situation in the Democratic Republic of Congo, supra n 46 at paras 77, 80 and 82–6; and Situation in the Democratic Republic of Congo, Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I, supra n 111 at paras 46–7.

Situation in the Democratic Republic of Congo in the case of the Prosecutor v Thomas Lubanga Dyilo, Decision on the requests of the Defence, supra n 113 at 5–6.
without undue delay;\textsuperscript{119} and (vii) the clarification of the notion of fairness and of its procedural implications.\textsuperscript{120}

The ICC has also borrowed important rulings from the ECtHR on implied and express external limitations upon human rights when interpreting its own qualification clauses. In \textit{Prosecutor v Lubanga}, the ICC found admissible documentary evidence that had been obtained as a result of a search and seizure conducted by the Congolese police authorities, with the assistance of an ICC prosecution investigator, in breach of Congolese procedural law and of the right to privacy.\textsuperscript{121} Trial Chamber I here reproduced the ECtHR's case law on Article 8 of the ECHR limitations (i.e. the \textit{Camenzind}, \textit{Miailhe} and \textit{Stefanov} judgments) and its justificatory analysis based on the requirements for relevant and sufficient reasons, and for a proportionate interference.\textsuperscript{122} The Trial Chamber held that the breach of an internationally recognised human right standard in the collection of evidence was compensated for by the following factors pursuant to Article 69(7) of the ICC Statute: (i) the evidence was still relevant, the illegality notwithstanding; (ii) the breach of the right to privacy was essentially imputable to the Congolese authorities; (iii) the breach was not a serious one; and (iv) the right to privacy interfered with was not that of the accused.\textsuperscript{123} The Trial Chamber thereby confirmed an earlier decision delivered by Pre-Trial Chamber I which had pointed to the qualified nature of the right to privacy through the endorsement of the proportionality technique fashioned by the ECtHR.\textsuperscript{124}

Although it has treated the ECtHR's case law mostly as having persuasive authority within its internal legal framework, the ICC has in a few cases underlined the peculiarity of the ICC system as a constraint on the

\textsuperscript{119} \textit{Situation in the Democratic Republic of Congo in the case of the Prosecutor v Katanga and Ngudjolo Chui}, Decision on the Prosecution's urgent application to be permitted to present as incriminating evidence transcripts and translations of videos and request for redactions, ICC-01/04-01/07-1260 (2009) at para 6.

\textsuperscript{120} \textit{Situation in Uganda}, Decision on the Prosecution's application for leave to appeal the Decision on victim's applications for participation, supra n 54 at para 27; \textit{Situation in Uganda}, Decision on Prosecutor's applications for leave to appeal, supra n 113 at para 24; \textit{Situation in Uganda}, Decision on Prosecutor's application for leave to appeal in part Pre-Trial Chamber IIs Decision on the prosecutor's applications for warrants of arrest, supra n 45 at para 30; and \textit{Situation in Uganda}, Judgment on the appeal of Thomas Lubanga Dyilo against the decision on the defence challenge to the jurisdiction of the Court, supra n 56 at para 38.

\textsuperscript{121} \textit{Situation in the Democratic Republic of Congo in the case of the Prosecutor v Thomas Lubanga Dyilo}, Decision on the admission of material from the 'bar table', ICC-01/04-01/06 (OAS) (2009) at paras 19 and 48.

\textsuperscript{122} Ibid. and at paras 21–4.

\textsuperscript{123} Ibid. at paras 40 and 46–7.

\textsuperscript{124} \textit{Situation in the Democratic Republic of Congo in the case of the Prosecutor v Thomas Lubanga Dyilo}, Decision on the confirmation of charges, ICC-01/04-01/06 (OAS) (2007) at paras 75, 79 and 81–2.
incorporation of Strasbourg authorities into its criminal procedure. In *Prosecutor v Bemba Gombo*, the ICC was restrictive in applying Article 21(3) of its Statute: account has to be taken of the specificity of the ICC’s legal system when invoking the case law of other international courts.

7. Normative Treatment of the ICC’s Internal Legal Framework by the ECtHR

The movement of judicial interaction has been essentially uni-directional in that the Strasbourg Court has never cross-fertilised, at least expressly, with the international criminal tribunals’ case law on defence rights. The ECtHR also seems to presume that international criminal courts are as protective of the accused’s rights as is the ECHR. On the other hand, the ECtHR has incrementally derived inspiration from the ICTY’s case law regarding sexual violence in order to inform the prohibition against torture, inhuman or degrading treatment and the positive obligations stemming therefrom, as well as from the ICC’s legal framework when clarifying the prohibition against retroactive criminal legislation.

In *Naletilic v Croatia*, which involved a challenge against Croatia’s decision to transfer the accused to the ICTY based on an alleged violation of his right to be tried without undue delay and the principle of legality of sentences, held that the ICTY’s internal legal framework offered a level of protection of defence rights that is generally equivalent to that reflected in the ECHR. It indeed held that ‘[i]nvolved here is the surrender to an international court which, in view of the content of its Statute and Rules of Procedure, offers all the necessary guarantees including those of impartiality and independence’. In *Blagojevic v The Netherlands*, wherein the accused alleged a breach of his right to legal assistance of his own choosing, the ECtHR similarly held that the ICTY is ‘founded on the principle of respect for fundamental human rights’, and that its main institutional and procedural rules purport ‘to provide those indicted before it with all appropriate guarantees’. These rulings signal that

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125 *Situation in the Central African Republic in the case of the Prosecutor v Bemba Gombo*, Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic and the Republic of South Africa, ICC-01/05-01/08 (2009) at para 42.

126 *Situation in the Central African Republic in the case of the Prosecutor v Bemba Gombo*, supra n 125 at para 42; and *Situation in the Democratic Republic of Congo*, Decision on the final system of disclosure, supra n 57 at Annex I, paras 14–5.

127 2000-V.

128 Ibid. at para 1

the ECtHR would be highly deferential to the ICTY, and more generally to international criminal courts, should any of their decisions, judgments or judicial policies be indirectly challenged before the ECtHR (via a connection with a Contracting Party to the ECHR).\textsuperscript{130}

The absence of judicial influence of international criminal courts’ judicial practice over the ECtHR’s interpretation of procedural guarantees has to be contrasted with the incremental impact of international criminal law on the ECtHR’s understanding of substantive human rights. In \textit{MC v Bulgaria}, for instance, the ECtHR was faced with the question of whether Bulgaria had breached the applicant’s rights under Articles 3 and 8 of the ECHR, and the positive obligations placed upon the respondent State to investigate allegations of rape. The ECtHR was inspired by the ICTY’s case law according to which rape does not presuppose force: the essential element of this offence instead being the victim’s absence of genuine consent to the sexual acts in question.\textsuperscript{131}

The ECtHR also referred to the ICTY, and to a lesser extent to the ICTR and ICC, when elaborating upon the principle of non-retroactivity of criminal offences and penalties as sanctioned in Article 7 of the ECHR.\textsuperscript{132}

Nevertheless, in cases where the ICC was referred to, the ECtHR only looked at the ICC Statute without borrowing any ruling from its jurisprudence.\textsuperscript{133}

8. \textbf{Admission by the ECtHR of Implied External Limitations upon Defence Rights}

The ECtHR has stated that it wished to avoid putting forward ‘a general theory of such limitations’.\textsuperscript{134} The ECtHR’s case law on implied external limitations upon defence rights has led certain criminal law scholars to conclude that ‘[t]he extent of these limitations is not subject to any general formula’.\textsuperscript{135} Other scholars on the contrary have seen in the ECtHR’s case law on fair trial rights the reflection of a ‘general theory of restrictions to the guarantees of

\textsuperscript{130} Zappalà, \textit{Human Rights in International Criminal Proceedings} (Oxford: Oxford University Press, 2003) at 12–3. This is all the more true given that the ICC Statute is more detailed as regards the protection of defence rights than the ICTY Statute.

\textsuperscript{131} 2003-XII: 40 EHRR 459, at paras 102–7 and 163.

\textsuperscript{132} Jorgic v Germany Application No 74613/01, Merits, 12 July 2007, at paras 42–4 and 49–51; Scoppola v Italy (No 2) Application No 10249/03, Merits, 17 September 2009, at paras 40, 41 and 105; Kononov v Latvia Application No 36376/04, Merits, 17 May 2010, at paras 211 and 215; and Korbely v Hungary Application No 9174/02, Merits, 19 September 2008, at paras 51 and 81.

\textsuperscript{133} Scoppola v Italy (No 2), ibid. at para 40; Kononov v Latvia, ibid. at para 211; and Korbely v Hungary, ibid. at paras 51 and 81.

\textsuperscript{134} Golder v United Kingdom A 18 (1975); 1 EHRR 524 at para 39; and Deweer v Belgium A 35 (1980): 2 EHRR 439 at para 49.

the European Convention on Human Rights.\textsuperscript{136} Although the latter statement is exaggerated given the ECtHR's uneven admission of implied external limitations upon fair trial rights, certain traits and tendencies can be identified in the ECtHR's case law. The reality thus lies between those two opposite ends.

A. Judicial qualification of the right of disclosure of evidence and virtually of any defence right

The purpose of this subsection is to underscore those cases in which the ECtHR or its individual judges have issued general statements whose ambit applies to all defence rights and not just to the right under consideration. Particularly illustrative of this tendency are Judge Martens' and Judge Kuris' dissenting opinions issued in \textit{Saunders v United Kingdom}.\textsuperscript{137} The case law on the rights of the accused to effective legal assistance, to privileged communication with one's defence counsel and to disclosure of evidence will also be pertinent for this analysis, especially as regards the ECtHR's emphasis on the less restrictive means test as a common applicable standard.

Judge Martens and Judge Kuris, in their joint dissenting opinion delivered in the \textit{Saunders} judgment, suggested that the rights to silence and not to self-incriminate are not absolute in scope; instead, they could be subject to restrictions in the same way as the other fair trial rights so long as these restrictions were in accordance with law and proportionate to the invoked legitimate objective.\textsuperscript{138} They referred to society's 'legitimate interests' as valid grounds of restriction of fair trial guarantees.\textsuperscript{139} The two dissenting judges manifestly relied on the pattern of reasoning specific to paragraph 2 of Articles 8 to 11 of the ECHR in order to assess the lawfulness of implied external limitations upon Article 6 of the ECHR. They nevertheless refrained from putting forward a legal basis for such an extension.

The ECtHR also admitted implied external limitations upon the accused's right to disclosure of evidence based on the State's pursuance of a legitimate public interest (national security or the effectiveness of the criminal investigation) or the protection of a competing right (the witness' right to life or security).\textsuperscript{140} The Court refrained from making this list of 'competing interests' exhaustive or from specifying criteria for ascertaining the legitimacy of the


\textsuperscript{137} \textit{Saunders v United Kingdom} 1996-VI; 23 E.H.R.R. 313.

\textsuperscript{138} Ibid. at Joint Dissenting Opinion of Judges Martens and Kuris, para 2.

\textsuperscript{139} Ibid. at para 10.

limitation ground. It adopted the requirements for strict necessity and for
counterbalancing procedures based on the *Van Mechelen v The Netherlands*\(^{141}\) judgment (a case involving the right to cross-examine prosecution witnesses), which it extended to the treatment of any defence right.\(^{142}\) The position can be taken that the less restrictive means test (formulated by the ECtHR under the label of ‘strict necessity’) here constitutes a self-sufficient requirement that is autonomous from the balancing exercise: non-compliance with this test alone should result in a finding that the respondent State has breached Article 6(1) of the ECHR.

In *Marcello Viola v Italy*\(^{143}\) and *Zagaria v Italy*,\(^{144}\) the ECtHR admitted implied external limitations upon both the right to effective participation in one’s trial, presented as an implied fair trial right, and the right to confidential communication with counsel, an implied right derived from the right to effective legal assistance under Article 6(3)(c) of the ECHR. Both precedents have in common the prescription of the less restrictive means test (cf. strict necessity) as a matter of general consideration and the emphasis on the legality requirement, as well as the inspiration drawn from the ECtHR’s case law on anonymous witnesses.\(^{145}\)

In *Marcello Viola v Italy*, the applicant alleged a breach of his rights to a fair trial, to be present, to effective legal assistance, to effective legal participation in his trial and to confidential communication with his defence counsel by reason of his involvement in the appeals proceedings being limited to video link as a result of a severe penitentiary treatment.\(^{146}\) The ECtHR here admitted the consistency with Article 6 of the ECHR of video-conferencing provided that the following conditions are met: (i) the existence of a ‘legitimate aim’;\(^{147}\) (ii) the requirement that the recourse to videoconferencing be founded on a legal basis;\(^{148}\) and (iii) the need for procedural safeguards.\(^{149}\) The ECtHR here found the following objectives to be legitimate: crime and disorder prevention; public safety; a witness’ life, security and liberty; and the need to ensure the speediness of the trial.\(^{150}\) As a matter of general concern, the ECtHR insisted on the requirement that interferences with any defence right satisfy the less restrictive means test or the strict necessity requirement.\(^{151}\) The ECtHR also held that States Parties to the ECHR had a duty to safeguard witnesses’ and

\(^{141}\) 1997-II; 25 EHRR 647.
\(^{142}\) *Rowe and Davis v United Kingdom*, supra n 140 at para 61. See also *Jasper v United Kingdom*, supra n 140 at para 52; and *Edwards and Lewis v United Kingdom*, supra n 140 at para 46.
\(^{143}\) 2006-XL.
\(^{144}\) Application No 58295/00, Merits, 27 November 2007.
\(^{145}\) *Van Mechelen*, supra n 141.
\(^{146}\) Supra n 143 at paras 26 and 44–8.
\(^{147}\) Ibid. at paras 51, 61 and 67.
\(^{148}\) Ibid. at paras 65–6.
\(^{149}\) Ibid. at para 67.
\(^{150}\) Ibid. at paras 70–2.
\(^{151}\) Ibid. at para 62.
victims’ rights to life, security, liberty and privacy under their criminal procedure.152 From the Court’s perspective, the fairness of the proceedings calls for a balancing of defence rights against witness and victim protection ‘in appropriate cases’.153 Two central authorities supported the ECtHR’s reasoning here: the Doorson and Van Mechelen judgments.154 The reference to a ‘legal basis’ is a novel development in the field of procedural fairness. In the plethora of case law pertaining to implied external limitations upon the right of access to a court, only one other precedent had clearly endorsed the need for a ‘legal basis’ as a distinct judicial requirement from proportionality and the essence of a right test: the Esposito v Italy inadmissibility decision.155

Zagaria v Italy is another landmark case in the field of implied external limitations upon defence rights. The ECtHR recalled the scope of the accused’s implied right to effectively participate in the hearing. It then held that Article 6 ECHR did not make it automatically unfair to substitute a videoconference for the physical presence of the accused in the courtroom provided that such a decision is underpinned by a ‘legitimate aim’, has a legal basis and is accompanied by ‘important guarantees’.156 The Court found that this mechanism was foreseen by Italian law, was designed to achieve ‘legitimate aims vis-à-vis the Convention’ (the same as those identified in Marcello Viola), and was surrounded by ‘important guarantees’, including the confidential nature of the communications between the accused and his defence counsel.157 Here, the accused contested not the very decision to resort to videoconferencing, as had been the case in Marcello Viola, but the interference caused by the interception by a security guard of a privileged conversation between the accused and his defence counsel in the course of the use of a videoconference, and by the subsequent reporting of the summary of its content to the head of the detention facility.158 The Court held that the accused’s right to confidential communication with his defence counsel, a derivative right of the right to legal assistance, could be curtailed ‘for good reasons’ provided that the accused’s right to a fair trial had not been breached.159 The Court then added that, in light of the essential role of procedural fairness in a ‘democratic society’, restrictions upon the exercise of any defence right had to be ‘absolutely necessary’, by reference to the Van Mechelen judgment (concerned with the right to cross-examine prosecution witnesses).160 The ECtHR expressly equated the absolute necessity

152 Ibid. at para 51.
153 Ibid.
154 See Doorson v The Netherlands 1996-II: 22 EHR R 330; and Van Mechelen v The Netherlands, supra n 141. See also Marcello Viola v Italy, supra n 143 at paras 51 and 62.
155 Application No 34971/02, Admissibility, 5 April 2007.
156 Supra n 144 at para 29.
157 Ibid.
158 Ibid. at paras 22 and 32–4.
159 Ibid. at para 30.
160 Ibid. at para 31. In Van Mechelen, supra n 141 at para 58, the ECtHR similarly held that ‘[i]f a less restrictive measure can suffice then that measure should be applied’.
criterion with the less restrictive means test.\textsuperscript{161} On the facts of the case, the ECtHR found that the interference was neither founded on a ‘legal basis’ nor underpinned by ‘good reasons’, even if it were ‘involuntary’ (as claimed by the Italian Government).\textsuperscript{162} The ECtHR’s reasoning is ambiguous. Indeed, the judgment here added an extra judicial requirement at the enforcement stage, namely the legal basis of the interference with the accused’s right to effective legal assistance, instead of integrating it into the outline of the applicable general principles (i.e. good reason and absolute necessity).\textsuperscript{163}

A further authority for underlying the qualified nature of all defence rights and more generally of fair trial rights can be found in \textit{Gafgen v Germany} wherein the ECtHR contrasted the absolute right enshrined in Article 3 of the ECHR with Article 6 of the ECHR.\textsuperscript{164} The latter unlike the former could be weighed against competing interests, which include ‘the seriousness of the offence under investigation’ and the ‘public interest in effective criminal prosecution’.\textsuperscript{165}

\textbf{B. Judicial qualification of the right to cross-examine prosecution witnesses}

The gravest form of interference with the right to cross-examine prosecution witnesses is absolute anonymity. The latter directly and automatically encroaches upon this express defence right in that it prevents the accused from being able to effectively dispute the witness’ allegations.\textsuperscript{166} Absolute anonymity has the inevitable consequence of precluding the accused from inquiring into the witness’ personal situation and therefore into the accuracy of the witness’ testimony.\textsuperscript{167} Given that the core of the right to cross-examine prosecution witnesses consists in its ‘truth-seeking’ function,\textsuperscript{168} such interference goes to the heart of the witness’ credibility and plausibility. The right to cross-examine prosecution witnesses would accordingly be devoid of its effectiveness absent the knowledge by the accused of the witness’ identity.\textsuperscript{169} Given that the right to cross-examine prosecution witnesses is a

\begin{itemize}
  \item \textsuperscript{161} Zagaria \textit{v} Italy, supra n 144 at para 31.
  \item \textsuperscript{162} Ibid. at para 32.
  \item \textsuperscript{163} Ibid. at para 32.
  \item \textsuperscript{164} Application No 22978/05, Merits, 1 June 2010, at paras 176–8.
  \item \textsuperscript{165} Ibid. at paras 176–8.
  \item \textsuperscript{169} Leigh, supra n 39 at 236; and Leigh, ‘Witness Anonymity Is Inconsistent with Due Process’ (1997) 91 \textit{American Journal of International Law} 80 at 81.
\end{itemize}
non-limitable or strong right, any admission of such interference (outside the context of a derogation procedure) amounts to the recognition of an implied external limitation upon Article 6(3)(d) of the ECHR.

In Doorson, the ECHR adopted a test for assessing the consistency of the judicial use of absolute anonymity with Article 6(1)–(3)(d) of the ECHR. This test consists of five parts: (i) the legitimacy of the objective put forward by the respondent State; (ii) the relevance and sufficiency of the underlying reasons; (iii) the need for procedural safeguards; (iv) the absence of exclusive or significant reliance by the national courts upon the anonymous testimony when convicting the accused (i.e. substantial corroboration requirement); and (v) the duty to handle such evidence with ‘extreme care’.170

The Doorson judgment needs to be read in light of Van Mechelen v The Netherlands. In the latter case, the ECHR recognised the need to verify the legitimacy of the objective in pursuance of which the anonymity of the witnesses was preserved.171 It then confirmed the continued validity of the double requirement for procedural safeguards and for substantial corroboration.172 Additionally, the ECHR insisted on a condition that was implicit in Doorson: the ‘strict necessity’ of any restriction upon a defence right. It indeed ruled that ‘[i]f a less restrictive measure can suffice then that measure should be applied’.173

9. Admission by the ICC of Implied External Limitations upon Defence Rights

The ICC has admitted implied external limitations upon the right to cross-examine prosecution witnesses (by extending the scope of the qualification clause relating to partial anonymity), the right to disclosure of evidence, and virtually upon any defence right based on general rulings derived from the ECtHR. Even though it has not yet pronounced on the issue of absolute anonymity, the ICC, if it were to admit such an implied external limitation, would probably condition this extreme measure upon strict justificatory requirements that mirror those conditioning judicial recourse to partial anonymity.

A. Judicial qualification of the right of disclosure of evidence and virtually of any defence right

The ICC, in Prosecutor v Lubanga, has interpreted the Court’s internal rules on disclosure of exculpatory evidence and confidentiality agreements concluded

170 Doorson v The Netherlands, supra n 154 at paras 70–6.
171 Van Mechelen v The Netherlands, supra n 141 at para 53.
172 Ibid. at paras 54–5.
173 Ibid. at para 58.
between the Prosecutor and information-providers\textsuperscript{174} in light of the ECtHR's corresponding case law.\textsuperscript{175} The ECtHR judgments quoted by the Trial Chamber admit implied external limitations upon the accused's right to have evidence disclosed by the Prosecutor.\textsuperscript{176} They allude to the existence of legitimate interests competing with the accused's defence right, essentially the protection of vulnerable witnesses and/or national security.\textsuperscript{177} These Strasbourg judgments also insist on the requirement for an end-test and the strict necessity of interferences with any defence right.\textsuperscript{178} Therefore, the ICC has implicitly suggested that any minimum guarantee of the accused could be curtailed if absolutely necessary to pursue a legitimate objective deemed sufficiently important.

In \textit{Prosecutor v Katanga and Ngudjolo Chui}, Trial Chamber II held that the accused's interests had to be balanced against those of victims and witnesses in the name of procedural fairness.\textsuperscript{179} It thereby recalled the qualified nature of the accused's right to disclosure of evidence.\textsuperscript{180} It found that Rule 81(4) had to be construed in light of the above mentioned balancing exercise.\textsuperscript{181} The Trial Chamber here alluded to the \textit{Dowsett} judgment wherein the ECtHR had admitted that the accused's right to disclosure of relevant evidence could be limited by reference to the need to guarantee the 'fundamental rights of another individual' (e.g. victims and witnesses protection) or an 'important public interest' (e.g. 'national security' or the secrecy of 'police methods of investigating crime').\textsuperscript{182} The Trial Chamber also endorsed\textsuperscript{183} the essence of the ECtHR's holding in \textit{Rowe and Davis}:

However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1 . . . . Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities . . . \textsuperscript{184}

\begin{flushleft}
\textsuperscript{174} Article 54(3)(e) and 67(2), ICC Statute.
\textsuperscript{175} \textit{Situation in the Democratic Republic of Congo}, supra n 46 at paras 80–6.
\textsuperscript{176} \textit{Rowe and Davis v United Kingdom}, supra n 140 at para 52; \textit{Jasper v United Kingdom}, supra n 140 at para 52; \textit{Fitt v United Kingdom}, supra n 140 at para 45; and \textit{V v Finland}, supra n 140 at para 75.
\textsuperscript{177} Ibid.
\textsuperscript{178} Ibid.
\textsuperscript{180} Ibid. at paras 31 and 33.
\textsuperscript{181} Ibid. at paras 29–31.
\textsuperscript{182} Ibid. at para 32.
\textsuperscript{183} Ibid. at para 33.
\textsuperscript{184} Supra n 140 at para 61.
\end{flushleft}
This Strasbourg dictum is famous in that it is formulated in such general terms as to apply across all defence rights. This general ruling was influenced by the Doorson\(^{185}\) and Van Mechelen\(^{186}\) judgments that were concerned with absolute anonymity.

**B. Judicial qualification of the rights to cross-examine prosecution witnesses and to disclosure of evidence\(^{187}\)**

In the context of requests for partial anonymity, the ICC has tailored an intermediary form of interference with the accused's right to cross-examine by extending partial anonymity to part of the trial proceedings, despite the contrary wording of Rule 81(4). This amounts to the recognition of an implied external limitation upon the right to cross-examine prosecution witnesses, albeit of a lower intensity than absolute anonymity. Absolute anonymity indeed implies that the accused will never be aware of the witness' identity during the entire judicial proceedings, as opposed to partial anonymity which entails only a delayed disclosure of the witness' identity to the accused.

In *Prosecutor v Katanga and Ngudjolo Chui*, Trial Chamber II granted the Prosecutor's request to have the identity of one of the two key prosecution witnesses disclosed to the accused only 45 days before being summoned to testify. The Trial Chamber conceded that this measure was especially detrimental to the accused but justified it on the basis of the 'exceptional' nature of the situation of the witness in question.\(^{188}\) The Trial Chamber made it clear that, in the future, it would not easily defer to requests for 'rolling disclosure.'\(^{189}\)

The issue of partial anonymity was not discussed by the Trial Chamber or by the parties by reference to the right to cross-examine prosecution witnesses but rather by reference to the accused's rights to disclosure of evidence, and to enjoy adequate time and facilities to prepare his defence.\(^{190}\) The Trial Chamber here clearly went beyond the ordinary wording of Rule 81(4) by extending the partial anonymity measure to a segment of the trial proceedings. This ruling has in reality validated an implied external limitation upon the accused's right to cross-examine prosecution witnesses. The interference is nonetheless of an intermediate intensity in this case, falling short of absolute anonymity: the concealment may not cover the period during which the witness is to testify. The Trial Chamber focused, in its justificatory

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185 Supra n 154.
186 Supra n 141.
188 *Situation in the Democratic Republic of Congo*, supra n 179 at paras 48 and 53.
189 Ibid. at para 53.
190 Ibid. at paras 16, 20, 24, 28 and 31.
analysis, upon the legitimate objective requirement and the less restrictive means test. It indeed found that the risk of threat to the security of the witness had been objectively established, and that the interference was ‘absolutely necessary’ in the absence of a less intrusive whilst equally effective measure.191

C. Implied qualification of the right to cross-examine prosecution witnesses—recognition in the future of absolute anonymity?192

Absolute anonymity does not fit within any suitable qualification clause of the ICC’s ‘internal legal framework’ for the following reasons. First, an a contrario interpretation of the Rules would be that the express allowance in the ICC Rules for pre-trial anonymity specifically reflects the intent of their drafters to oppose absolute anonymity.193 Second, the absence of provision in the Statute or the Rules authorising absolute anonymity in and of itself would suggest its lack of legal basis.194 Third, the difference in terminology found in Article 64(2) of the ICC Statute with respect to defence rights and witness protection (i.e. ‘full respect’ versus ‘due regard’) confirms the statutory pre-eminence of the accused’s minimum guarantees over the witness’ right to privacy and security. Fourth, neither the right to a fair hearing nor the minimum guarantees of the accused are made subject to the protection of victims and witnesses: only the right to a public hearing is.195 Fifth, the Preparatory Committee voiced its ‘concern . . . over the possible use of anonymous witnesses’ during its 1996 proceedings: recourse to this technique could make it difficult for the accused to dispute the witness’ credibility.196 Sixth, the Draft Statute for an International Criminal Court adopted by the International Law Commission at its 46th session (‘ILC Draft’) had proclaimed the accused’s rights to a fair and public trial before making them expressly ‘subject to’ the Article dedicated to the ‘[p]rotection of the accused, victims and witnesses’.197 The mention of the adjective ‘subject’ found in this ILC Draft, which suggested a form of generic

191 Ibid. at para 44.
192 The first paragraph of this sub-section was first published in Croquet, supra n 187 at 8–9.
193 Article 68 of the ICC Statute expressly limits the concealment of the witness’ identity from the accused to the pre-trial proceedings. Rule 76 for instance compels the Prosecutor to notify the accused of the witnesses’ names in due course so as to allow him to organize his defence on time. See Nicholls, supra n 167 at 298–9; and Knoops, supra n 39 at 210–1.
195 Articles 67(1) and 68(2), ICC Statute. Protective measures are semantically described by the Statute as ‘exceptions’ to the right to a public hearing.
197 Ibid. at 667.
limitation clause, is absent from the current text of Article 67(1) of the ICC Statute. Article 67(1) instead contains the expression 'having regard to the provisions of this Statute'.

The ICC has not pronounced yet upon the question of the validity of absolute anonymity under the ICC legal framework. Nevertheless, the ICC has indicated possible parameters, which it would use to settle conflicts between defence rights and legitimate competing interests. This was particularly striking in the context of requests for partial anonymity on which occasion the ICC has shaped and interpreted the conditions for permitting such a protective measure. The criteria are slightly different depending on whether it is the possibility of having an *ex parte* hearing to consider a partial anonymity request which is being discussed or whether it is the actual concealment of the identity from the accused. The first step of the ICC's assessment will be referred to as the 'procedural component' of Rule 81(4) whilst the second one as the 'substantive component' thereof. These criteria developed in furtherance of the ICC qualification clause relating to partial anonymity may inform the way in which the ICC in the future could frame the admission of absolute anonymity as the highest form of interference with the right to cross-examination.

(i) Procedural component of Rule 81(4)

The ICC has been very far-reaching regarding the determination of the criteria for ordering an *ex parte* hearing in relation to a request for partial anonymity. The Court has expressly modeled its justificatory analysis upon the ECtHR's methodology pertaining to qualified rights (i.e. Articles 8 and 10 of the ECHR) and upon the ICTY's jurisprudence on self-representation, which was in turn influenced by the ECtHR's case law on qualified rights, on the right to an impartial tribunal and on the right to self-representation. The ICC shaped a three-stage justificatory test: (i) compelling legitimate objective; (ii) less restrictive means test; and (iii) strict proportionality.\(^{198}\)

(ii) Substantive component of Rule 81(4)

Here, the ICC has seemingly embraced a three-prong justificatory test consisting in the following three criteria: (i) the existence of a legitimate aim (i.e. security risk in case of full disclosure of the witness' identity); (ii) the adoption of a less restrictive means test; and (iii) the use of a balancing exercise, or

\(^{198}\) *Situation in the Democratic Republic of Congo*, supra n 57 at para 13; *Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo*, Decision on the prosecution motion for reconsideration and, in the alternative, leave to appeal, ICC-01/04-01/06 (2006) at para 50; and *Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo*, Decision on the procedures to be adopted for ex parte proceedings, ICC-01/04-01/06 (2007) at para 12.
strict proportionality. The ICC referred to the Strasbourg cases in which the ECtHR had admitted implied external limitations upon the right to disclosure of evidence and the right to cross-examine prosecution witnesses, based on the pursuance of competing interests (whether individual or public interest-oriented). The Court on one occasion even made reference to the ‘sufficient procedural safeguards’ requirement by reference to the Strasbourg case law.

The ICC substantially deferred to the ECtHR’s case law in Prosecutor v Lubanga. In this case, the ICC Appeals Chamber held that the communication by the Prosecutor, in the course of the confirmation proceedings, of summaries of testimonial evidence to the defence under Article 61(5) of the ICC Statute without revealing the witnesses’ identities to the defence was not necessarily ‘prejudicial to or inconsistent with the rights of the accused and the right to a fair and impartial trial’. It supported this conclusion by reference to the ECtHR’s case law on anonymous witnesses and especially the Doorson judgment. The Appeals Chamber held that the absence of disclosure of the witnesses’ identities to the defence pursuant to Rule 81(4) had to be in compliance with three main conditions: (i) the witness or a family member would otherwise be put at danger should the witness’ identity be revealed; (ii) the measure had to be necessary; and (iii) respect had to be had for the right of the accused to a fair trial and to minimum procedural guarantees.

10. Possible Explanations for the ICC’s Significant and Consistent Deference to the ECHR Jurisprudence

This great, and it is submitted, excessive reliance by the ICC upon the ECtHR’s case law, which assigns persuasive authority to the judgments of the Strasbourg court, may have various explanatory factors that are based on the reception of the ECtHR’s case law by other fora, the inherent structure of the ECHR system, the normative underpinnings of the ECHR, the general impact of the Strasbourg case law, and the relative institutional weaknesses of competing international human rights systems. These factors are considered in the following paragraphs.

199 Situation in Uganda in the case of the Prosecutor v Joseph Kony and others, Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-01/05 (2007) at para 24; and Situation in the Democratic Republic of Congo in the case of the Prosecutor v Thomas Lubanga Dyilo, Decision on second defence motion for leave to appeal, ICC-01/04-01/06 (2006) at 7.

200 Situation in the Democratic Republic of Congo, supra n 57 at para 32.

201 Ibid.

202 Ibid. at para 50.

203 Ibid.

204 Ibid. at para 21.
The Strasbourg system of human rights protection enjoys an element of ‘universality-legitimacy’ in the dissemination of its judicial practice across various legal and judicial systems worldwide. The ECtHR has produced important precedents, some of which have been invoked by other international human rights bodies such as the Inter-American Court of Human Rights (IACtHR), the United Nations Human Rights Committee (HRC), or the African Commission on Human and People’s Rights (African Commission). Constitutional courts of States not parties to the ECHR have also relied upon this jurisprudence. This phenomenon has led Attanasio to describe the ECtHR as a ‘sort of world court of human rights’. Slaughter explained the influence of the ECtHR’s case law over other legal fora in the following terms:

What is striking, of course, is that the ECHR has no formal authority over any courts outside Europe. Its decisions have only persuasive authority; weight is accorded to them out of respect for their legitimacy, care, and quality by judges worldwide engaged in a common enterprise of protecting human rights.

Furthermore, the ICCPR, the ACHR and the African Charter on Human and People’s Rights (AFCHPR) have been drafted, after drawing inspiration from

205 OC-69/2000, Cantonal-Benavides v Peru IACtHR Series C 69 (2000); 8 IHRR 1049 (2001) at paras 95 and 99; and OC-123/2005, Caesar v Trinidad and Tobago IACtHR Series C 123 (2005); 14 IHRR 159 (2007) at paras 64 and 67.

206 Francis v Jamaica (606/94), CCPR/C/54/D/606/1994 (1995); 3 IHRR 43 (1996) at para 4.4; Colin Johnson v Jamaica (653/95) CCPR/C/64/D/653/1995 (1998); 6 IHRR 643 (1999) at para 3.7; and Joseph Kindler v Canada (470/91) CCPR/C/48/D/470/1991 (1993); 1(2) IHRR 98 (1994) at para 15.3. Lambert nevertheless argued that the impact of the ECtHR’s case law upon the HRC has been less acute than upon the IACtHR: see Lambert, supra n 8 at 800.


the text of the ECHR and giving it due consideration.212 At the same time, the authors of the ECHR took inspiration themselves from the Universal Declaration on Human Rights and the early drafts of the ICCPR, as put forward by the United Nations Commission on Human Rights, when envisaging and elaborating the text of the Convention.213

The ECHR experience is itself a useful model for other international judiciaries that are to adjudge allegations of human rights violations. The ECHR was the result of a normative ‘compromise’ between the common law and civil law systems, especially given the leading roles of the United Kingdom and France in the negotiations leading to the adoption of the treaty.214 The ECtHR has also had to reconcile the tension between these two legal families when defining autonomous concepts and harmonizing fair trial standards given that most States Parties’ domestic law tends to reflect the essential features of one or the other legal family.215 This makes the ECtHR’s case law a particularly attractive source of inspiration for international criminal courts like the ICC. Indeed, the latter likewise has to balance out the orientations typical of each legal family when shaping general principles of international criminal procedure.216 In short, the legal division characterising the composition of the Council of Europe is, to a certain extent, mirrored in that of the Assembly of States Parties, leaving aside the situation of mixed legal systems.

The ECtHR has sometimes expressly drawn a parallel between its procedure and that of a national constitutional court.217 In Nölkenbockhoff v Germany,


215 See Cassese, supra n 35 at 143 and 150; and Costa, supra n 212 at 103.

216 See Cassese, supra n 35 at 150; and Bassiouni, Introduction to International Criminal Law (Ardsley: Transnational, 2003) at 586.

217 See Lambert, supra n 8 at 24.
the ECtHR considered that the individual complaints procedure before the German Constitutional Court was ‘similar’ to that of the ECHR.218 Moreover, the Strasbourg Court has gone as far as to treat the ECHR as a ‘constitutional instrument of European public order’.219 In Karner v Austria, the ECtHR confirmed the coexistence of its primary mission of adjudicating upon individual complaints and of its public interest mission in defining common human rights standards, thereby ‘extending human rights jurisprudence throughout the community of Convention States’.220 This constitutional mission of the ECtHR makes its case law even more transposable due to the more abstract nature of its rulings based on a dynamic and evolving method of interpretation.221 General standards of human rights protection characterised by a relative fluidity may be normatively attractive to other national and transnational bodies of law.

The ECtHR’s ‘universality-legitimacy’ may also be observed when comparing the number of States subject to its jurisdiction compared to other similar bodies. The ECtHR is competent to adjudge claims brought by or against any of the 47 States Parties to the ECHR from Western, Central and Eastern Europe, encompassing the majority of the States that formed part of the USSR.222 While all Contracting Parties to the ECHR fall under the compulsory jurisdiction of the ECtHR, the IACtHR’s jurisdiction has only been accepted by 19 of the 35 Member States of the Organization of American States (OAS), excluding Canada and United States.223 This makes the IACtHR less representative of the Pan-American continent than the ECtHR is of the ‘greater Europe’, which may explain the lesser influence which this regional court has exerted upon other transnational legal systems.

Although 53 States are now parties to the African Charter of Human and People’s Rights (ACHPR),224 its substantive scope and its institutional monitoring mechanisms remain weak overall. The substantive wording of the ACHPR

223 Claude and Weston have posited that the absence of ratification of the ACHPR by the USA had contributed to the weak impact of the IACtR as a regional human rights body: see Claude and Weston, ‘International Approaches to Human Rights Implementation’, in Claude and Weston (eds), Human Rights in the World Community, 3rd edn (Philadelphia: University of Pennsylvania Press, 2006) 325 at 334–5. Although 24 Member States of the OAS are parties to the IACtR, only 19 of them have accepted the IACtR’s jurisdiction. The latter States are exclusively civil law countries with the exception of Venezuela: see http://www.oas.org/juridico/english/Sigs/b-32.html#Honduras [last accessed 30 November 2010].
suffers a higher level of vagueness than the ECHR, thereby making it less reliable as an external source of human rights for the ICC. The provisions dedicated to the right to a fair trial and its procedural implications for the accused in criminal proceedings are rudimentary and lack the degree of detail found in the ECHR: they fail to include the right of the accused to cross-examine prosecution witnesses, the right to adequate time and facilities for the preparation of the accused’s defence, and the accused’s right to self-representation. At the more institutional level, the African Commission has played a preponderant role in the African system of human rights protection. This body, which does not work on a full-time basis, nevertheless delivers decisions which neither produce obligatory effects on the respondent States nor result in ‘legally enforceable remedies’. In short, the African Commission ‘can only make recommendations to the parties’. Moreover, the African Commission has not been set up as an adjudicatory body but rather as a human rights promoter, a human rights investigatory body and a conciliator. Overall the African Commission lacks adequate funding in the face of the breadth of its human rights mandate. The process of examining a communication is also lengthy, generally non-transparent, and primarily aimed at encouraging the ‘amicable resolution of disputes’. Moreover, the African Commission is not sufficiently independent vis-à-vis the African Union (as the latter monitors the activities of the former) and its Member States. The African Court on Human and Peoples’ Rights (ACtHPR) was set

225 Lambert, supra n 8 at 506. Buergenthal in fact argued that the ECHR was meant to produce direct effect due to the concrete formulation of its human rights provisions and the avoidance of general policy statements: see Buergenthal, supra n 68 at 82.
226 See Articles 3, 7(1) and 26 ACHPR. The African Charter fails to expressly refer to the need for ‘fair’ criminal proceedings.
230 Lambert-Abdelgawad, supra n 202 at 168.
231 Doebbler, supra n 227 at 14; and Udombana, supra n 227 at 71–2.
232 Doebbler, ibid. at 13–4; and Viljoen, supra n 226 at 18.
234 Rehman, supra n 226 at 330.
236 Udombana, supra n 229 at 70–1.
up following the entry into force of an Additional Protocol to the ACHPR in 2004. The ACHPR, whose judges sit on a part-time basis, has only been assigned a handful of cases so far. Over those few cases, it has only delivered one judgment in which it denied jurisdiction to hear the case given the absence of declaration of acceptance of the right to individual petitioning before the ACHPR. This regional human rights court will merge with the ‘virtual’ African Union Court of Justice, the principal judiciary of the African Union, to form the African Court of Justice and Human Rights (ACJHR). Once functional, the ACJHR will be empowered to interpret and apply not only the ACHPR but also the internal legal instruments of the African Union, general principles of African law and the traditional sources of public international law. Therefore, the ‘judicialisation’ process of the African system of human rights has been rather slow and ineffective in comparison to the ECHR even though this new pan-African human rights framework should encourage the prospective ACJHR to apply a more holistic and systematic assessment of international and comparative human rights sources than under the current institutional framework.

Even though the Human Rights Committee has a broader jurisdictional scope than that of the ECHR due to the openness of the ICCPR to any Member State of the United Nations, this human rights body suffers a weak institutional framework and is merely ‘quasi-judicial’. Indeed, its ‘views’ do not enjoy the binding authority attached to final judgments delivered by an


238 The President of the ACHPR nonetheless remains a full-time member of the Court. See Articles 15(4) and 21(2) of the Protocol to the African Charter on Human and People’s Rights on the Establishment of the African Court on Human and People’s Rights.


244 Article 48, ICCPR.

international adjudicatory body. Furthermore, its composition is limited to experts, not necessarily lawyers, who do not work on a full-time basis.246

The ECtHR’s case law is also the most significant from a quantitative viewpoint compared to the other international human rights bodies’ case law,247 with the majority of its non-compliance judgments pertaining to fair trial rights.248 This quantitative context finds its origin, amongst others, in the extension of the ECHR geographic scope to East- and Central European States subsequent to the collapse of communism on the continent, and the increasing awareness within public opinion of the importance of the ECHR as a concrete instrument of human rights litigation.249 This plethora of case law, especially in relation to fair trial rights, has allowed the ECtHR to tackle a wide diversity of cases, thereby making the ECHR standards reasonably elastic.

11. Conclusion

Fair trial rights are a hybrid category of human rights, which some legal scholars have even characterised as imperative norms of public international law. They have a mixed character in that fairness per se represents an individual framework right that includes defence rights, but may also constitute a public interest ground invoked in order to override a minimum guarantee of the rights of the accused.

Under the ECHR, fair trial rights are derogable but cannot be limited (with the exception of the right to public hearings). They are better protected than 'qualified rights' but more vulnerable than 'non-derogable' or purely absolute rights. There is hardly one classification that may be apt to convey the difference in normativity between the various rights enshrined in the text of the ECHR and of its Protocols. Under the ICC internal framework, fair trial rights are non-derogable but the right to a public hearing is limitable based on a


248 2009 Annual Report of the Registry of the ECHR at 73.

statutory limitation clause. Other fair trial rights such as the right to cross-examine prosecution witnesses, the right to disclosure of evidence or the right to self-representation are covered by qualification clauses. These clauses are regulatory provisions found in the Statute, Rules of Procedure and Regulations of the ICC, which have the potential to interfere with the exercise of these rights depending on the way in which the judge interprets them.

The ECtHR and the ICC share the same approach to procedural fairness by leaving its scope deliberately open-ended and subject to dynamic interpretation. Procedural fairness subsumes the minimum guarantees of the accused but also includes other procedural guarantees that are not expressly set forth in the respective statutory instruments of the ECtHR and the ICC. Every violation of a defence right or minimum guarantee, unless justified, will entail a breach of the right to a fair trial but mere compliance with defence rights does not guarantee the fairness of the criminal proceedings. The inherently variable nature of the right to a fair trial is a source of legal uncertainty for the accused, States and national/international judicial actors. At the same time, this normative elasticity will tend to favour the accused by allowing the international judge to account for procedural defects disruptive of procedural equality, which had not necessarily been anticipated by the drafters of the relevant texts.

A process of incrementally admitting implied external limitations upon defence rights is visible in the ECtHR’s and the ICC’s judicial practice. Such limitations consist in the international judiciary permitting, in the absence of or beyond the ordinary terms of a limitation or qualification clause, prima facie breaches of a right based on a public interest ground or the protection of a human right, subject to satisfaction by the interfering authority of a series of justificatory criteria. In this regard, there has been a clear pattern of cross-fertilisation between the two international courts, albeit of a unidirectional nature: the ECtHR has formally and substantively influenced the ICC in the interpretation of defence and fair trial rights but not yet the converse. The ECtHR has nonetheless already found that the ICTY’s statutory instruments provided a level of protection of procedural rights that is equivalent to that reflected in the ECHR, a reasoning that it will likely extend to the ICC human rights regime if faced in the future with an indirect challenge against an ICC judgment.

As far as general statements on implied external limitations upon defence rights are concerned, the ICC has deferred to the ECtHR’s case law on disclosure evidence, the latter being itself influenced by the Strasbourg judgments on the right to cross-examine prosecution witnesses. Two prevalent justificatory criteria (the minimum minimorum) in both the ECtHR’s and the ICC’s respective case laws have been the legitimate aim requirement and the less restrictive means test. A central concern in relation to the legitimate aim requirement has been witness and victim protection. The less restrictive
means test requires that between several equally suitable means of pursuing a competing interest, the one which interferes least with the human right is selected.\(^{250}\) It has the effect of excluding ‘inefficient human rights limitations’.\(^{251}\) The main question raised will be ‘whether the decision, rule or policy limits the relevant right in the least intrusive way compatible with achieving the given level of realization of the legitimate aim.’\(^{252}\) This test does not prejudge the required degree of satisfaction of a public interest but leads to the exclusion of ‘avoidable fundamental rights sacrifices’, bearing in mind a specific degree of achievement of a legitimate interest.\(^{253}\) This proportionality exercise has been presented by constitutional scholars as entailing a cumbersome form of judicial review.\(^{254}\)

When interpreting its own qualification clause on partial anonymity, the ICC has also been insistent on a further proportionality criterion, namely the strict proportionality requirement or the balancing technique. Strict proportionality implies carrying out a ‘cost-benefit analysis’.\(^{255}\) It asks whether the interference with a right entails ‘a net gain’ when balancing the degree of seriousness of the breach of a right with the degree of importance of the legitimate interest.\(^{256}\) In other words, the ‘marginal benefit’ to the public interest goal will be weighed against the ‘marginal damage’ to the said right as a consequence of the interference with it.\(^{257}\)

Although the travaux préparatoires of the ICC Statute as well as the structure of the ICC’s internal legal framework display a bias against absolute anonymity, the ICC has not yet pronounced on requests for such an extreme protective measure and thus not ruled it out as a matter of principle. Nevertheless, the ICC rulings on the validation of partial anonymity may indicate how the ICC might address requests for absolute anonymity: a strict adherence to a proportionality review so as to make recourse thereto rather exceptional. This would require (hypothetically) a compelling legitimate interest and satisfaction of the less restrictive means test and of the strict proportionality requirement.

Although the ICC has been consistently deferential to the ECtHR’s case law and has generally treated it as having persuasive authority, it has failed to conceptualise ECHR case law as a crucial source of guidelines for the permanent international criminal court. It would have been expected from the ICC that it describe the way in which Strasbourg judgments relate to other international


\(^{251}\) See Rivers, supra n 28 at 200.

\(^{252}\) Ibid. at 198.


\(^{254}\) See Arai-Takahashi, supra n 79 at 15.

\(^{255}\) See Rivers, supra n 28 at 200.

\(^{256}\) Ibid. at 180–1.

human rights authorities, so as to better understand their higher status in the judicial practice of the ICC. Instead, the ICC has described or even just quoted ECHR judgments in order to fashion the scope of fair trial standards or to delineate the justificatory criteria when assessing external limitations upon defence rights. The ICC more generally has refrained from systematically referring to Article 21(3) of the ICC Statute as a legal basis for the incorporation of external sources of human rights law.